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JUDICIAL RECALL

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OF MISSOURI

ON "THE DILEMMA OF THE JUDICIAL RECALL"

BY

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THE DILEMMA OF THE JUDICIAL-RECALL ADVOCATE.

[Address before the Missouri State Bar Association, delivered at St. Louis, Mo., September 23, 1914. By ROME G. BROWN, Minneapolis, Minn.]

GENTLEMEN OF THE MISSOURI STATE BAR: I am bringing coal to New Castle when I present to you arguments against the judicial recall. The subversive measures of the recall of judges and of the recall of judicial decisions have never found favor among the enlightened membership of the Missouri bar. Indeed, this bar has been the source of one of the most convincing arguments against the judicial recall that has ever been uttered in this country. In his "Legal Antiquities," Mr. Edward J. White, your president, has demonstrated that the judicial recall is in both its forms a relic of barbarism. His book is one which should be read by every American citizen. Among its chief merits is the fact that although primarily a lawyer's book it is written with a view to illuminating the citizen voter. It is clear, perspicuous, and comparatively free from technicalities. No adequate conception of the real significance of the modern American agitation of the judicial recall can be acquired without consideration of the conclusive arguments made by Mr. White.

PRESENT STATUS OF THE JUDICIAL-RECALL AGITATION.

The conditions affecting discussions of this question are quite different to-day from what they were two years ago. Until recently the agitation in this country in favor of the judicial recall was by appeals to the prejudice of the uninformed citizen; while at the same time the arguments against it were confined mostly to discussions among lawyers themselves, who spoke in the language of lawyers and assumed on the part of their audiences a training in the science and history of government. These technical and legal protests reached few citizens beyond those who were members of the legal profession. At the same time, however, the forces of disruption, represented by the advocates of judicial recall, through subtle and insidious manner of statement were fast gaining converts among the people through arguments which were in fact, although not then so generally recognized, the basis of a demand for a change in our form of government.

It is not for me to instruct the members of the American bar upon questions of constitutional government. It has been, however, my purpose, and is here to-day my purpose, to present certain phases of the judicial-recall question in terms which may be readily understood by the average citizen voter. It is my object to urge every member of this bar to do likewise, and to help bring to the electo-

rate of this State and of the Nation an appreciation of the true significance of the judicial recall, and the conviction which you and I feel that every movement in favor of judicial recall is retrogressive in its nature; that it is subversive; that, indeed, it is an instrument of socialism. The extent to which this phase of socialism has spread in the United States before its baneful character could be appreciated by the people at large is shown by the fact that already in five States the recall of judges has been incorporated into State constitutions. The early example of Oregon in 1908 was followed during the past two years in Nevada, in Arizona, in California, and in Colorado. Indeed, Colorado made a still further retreat before the opponents of constitutional democracy when it also wrote into its State constitution the recall of judicial decisions. In 1913 the State legislatures of Kansas and Minnesota proposed constitutional amendments allowing the recall of judges, and these amendments will be passed upon at the general elections this fall. In these two States the judicial-recall proposition was sugar-coated and fed to and swallowed by the legislatures of those States without adequate consideration. This was done by providing that the election for a successor of a deposed judge should be separate from that of the election by which a judge was recalled, and it was claimed that this elimination of one of the incidental objections to the recall made the measure acceptable. Vigorous campaigns in both States are being made to defeat these amendments. They do not find favor among representative members of either of the two leading political parties. They were passed by legislatures during a sort of epidemic of so-called "progressiveism." They were incited by the then too prevalent belief that any radical change, if it only be branded as "progressive," was a step toward reform.

But this epidemic of radicalism is waning. There is now less tendency to confound change with progress. The pendulum of public opinion is returning to its normal range of swing, far within the extreme limits of revolution on the one side and of obstinate and unreasonable standpatism on the other. To-day a man is not so much considered an archaic reactionary just because he insists on stopping to deliberate, or even to debate, before accepting the proposition, for instance, that the constitutional safeguards to liberty and property may be disregarded by a court, if such court shall deem it for the public interest in any particular case. To-day a man is not so much a "plutocrat" if he insists that capital invested under constitutional protection shall not be deprived of adequate returns simply for the sake of increasing the public revenue. To-day there are fewer audiences in this country before which a man's opinion could be derided and scorned as that of a "conspirator" in favor of "allied invested interests," solely for the reason that he advocates the preservation and maintenance of our constitutional form of democracy instead of its subversion, by striking at the independence of the judiciary, or by wresting from the judicial department of our Government the power to exercise the essential and fundamental judicial function, the maintenance of which is the keystone of our form of government—the function of passing final judgment upon the constitutionality of statutory provisions.

THE JUDICIAL RECALL ON THE WANE.

There are, throughout the Nation, significant evidences of increasing enlightenment upon the question of judicial recall. While the average voter has as yet insufficient appreciation of its baneful character, nevertheless there is a perceptible change in sentiment showing itself among the people of the different States. Former leading advocates of the judicial recall are saying less about it. Some of them are now saying nothing about it. Many have retreated to a position less repugnant to constitutional government. For instance, there had been most persistent advocacy of the judicial recall in Ohio. The president of the recent Ohio constitutional convention and many influential members of that convention, who are not learned in the law, were, and still are, advocates of the recall of judges and of judicial decisions. Yet that constitutional convention refused to refer to the electors of Ohio the proposition of judicial recall. Instead that convention proposed a State constitutional amendment, which was adopted by the people, providing that no act of the legislature, duly approved by the executive and not vetoed by the people through the use of the referendum, shall be declared unconstitutional by the State supreme court unless six of the seven judges concur. So in the constitutional amendment proposed for adoption at the general election this fall in Minnesota, increasing the number of supreme court judges from five to seven, it is required that a concurrence of five out of seven judges shall be necessary in order for that court to declare a statute unconstitutional. Colorado participates in the same plan. This has become known as the "Ohio plan."

In Colorado, however, a further amendment forbids the judges of certain courts from declaring a statute or ordinance unconstitutional on the ground that it contravenes the Federal Constitution. The jurisdiction and function of a State court, so far as observing the requirements of the Federal Constitution is concerned, are, however, fixed by that instrument, which makes it the sworn duty of every judge, Federal or State, to observe the provisions of that fundamental law as the supreme law of the land. This duty and function have been established, as an essential principle of our form of government, to include the power and obligation of every court, and of every judge of every court, to declare unconstitutional and unenforceable any statute, and any provision of any statute, which is repugnant to the prohibitions and limitations expressed in the Federal Constitution. Such duty and function, therefore, would seem to be not subject to abolishment or diminution by any legislative enactment or constitutional provision of a State. Accordingly, the Colorado extension of the Ohio plan is itself manifestly repugnant to the Federal Constitution, and, therefore, invalid. Depriving a mere majority of a State supreme court of the power to declare a statute invalid and unenforceable is less objectionable. Substitutes, such as the Ohio plan, for the drastic and subversive judicial recall measures have the merit that they are, at least, less repugnant to our system of government.

Indeed, as through the initiative and referendum the powers of State legislation become more and more under the direct arbitrary

action of the electorate, it is necessary, for the proper protection of personal liberty and property rights, that the safeguards of the Federal Constitution should, more than ever, come within the direct jurisdiction of the Federal Supreme Court. Under the present Federal judiciary act that Federal jurisdiction, as applied to the review of judgments of State courts upon the constitutionality of State statutes, is limited to a review of the judgments of State courts wherein statutes are held valid. The American bar has long advocated the extension of that Federal jurisdiction also to decisions of State courts wherein a State statute is held invalid upon Federal grounds; but it seems difficult, and perhaps impossible, to get such extension through the Federal Congress. At the present time a majority of a State supreme court may generally declare a State statute invalid. The more difficult it is made for a State supreme court to invalidate a State statute, the more is the opportunity increased to have the constitutionality of a State statute adjudicated by the Federal Supreme Court. Where now usually a majority of a State supreme court may invalidate a State statute upon Federal grounds, the final judgment of the highest court of that State as to the constitutionality of such statute must, under the Ohio plan, be in favor of its validity unless more than a majority of the State court are against it. This would increase the number of cases where a writ of error would lie to the State court upon an adjudication of a constitutional question. I am not advocating the Ohio plan, but simply suggesting that, for existing insufficiencies which are recognized by the bar generally, it offers some elements of remedy consistent with our form of government. In that respect it differs from the judicial recall, which is lacking in remedial character and is subversive of our form of government.

THE DILEMMA OF THE ADVOCATE OF JUDICIAL RECALL.

An interesting and encouraging phase of the judicial recall controversy has emerged in the form of a dilemma with which the recall advocate is, under present conditions, squarely confronted. The widespread opposition arguments to the judicial recall have brought a wholesome enlightenment to thinking citizens. Its representative advocates have generally been superficial theorists, to whom an intelligent comprehension of our system of government is impossible. Some have been conscientious, but sadly lacking in those foundations of knowledge for which a proper grasp of the subject is necessary. Some have been reckless agitators, disciples of unrest, who, not from lack of intelligence, but from lack of proper regard for our free institutions, have been willing to exploit themselves as advocates of a drastic and suicidal specific for existing evils in the administration of government. The demagogue is always with us. Men, including some who were once sane leaders of thought and of action, have been willing to feed the fires of revolution by catering, not to the intelligence, but to the lack of intelligence, of those who would pretend to believe that our Government is an organized system of oppression. Then there is the socialist doctrinaire, whose propaganda of enmity to our Constitution and the Government established under it has been spread broadcast through pamphlets, the socialist

press, and by the street-corner orator. The methods of the advocacy of judicial recall by all these agitators have been marked by a wholesale denunciation of the judiciary and of the judicial function under our system of government, the stability of which depends upon the maintenance of the integrity and independence of its judicial departments. This propaganda of disruption has also been furthered by the professional or chronic muckraker, appearing in the form of a contributor to or editor of some magazine of wide circulation, or in the form of some political or judicial pervert who allows himself to become the instrument of socialist teachings.

It was formerly sufficient that the judicial recall shouter should detail both real and imaginary evils in the administration of law as the source of all social injustice, and, without analysis and without disclosure of its real significance, should then urge as a panacea the assertion by the citizenship of the Nation of the right arbitrarily to recall a judge, or of the right at a mass meeting of the voters or through a referendum ballot and in violence of the judicial function directly and arbitrarily to adjudicate the constitutionality of a statute. Voters were thus at first misled by the impression that by the removal of limitations upon the arbitrary power of the electorate we would have a government which was nearer to a pure democracy, and that in so far as our democracy limited the powers of the people it was the means of oppression. Thus through hue and cry the fallacies of the judicial recall gained a strong hold upon the minds of the voters in many States.

But, in the meantime, a campaign of education has been continued by the opponents of judicial recall. Through their efforts people are recognizing more and more the fact that rules of conduct are necessary in governmental affairs as well as rules of conduct in regard to ethical duties between man and man; that for the protection of the individual and of minorities against the oppression of the whim and caprice of local and temporary majorities, it is necessary that the legislative power of the majority be limited, and that in no other way can the personal liberty and the rights of property and the pursuit of happiness be vouchsafed to the citizens of a constitutional democracy. The fact is further becoming recognized by the citizen voter that rules of conduct in governmental affairs are meaningless without some established power of their enforcement, and that such assurance can only rest in the maintenance of an independent judiciary, to whom shall belong the function of setting aside any arbitrary legislation of a majority which deprives the individual or the minority of the rights which are thus safeguarded. The attack upon the established judicial function which is made by the judicial recall, has been discovered to the people as an attack upon their rights and liberties, because it is an attack upon the safeguards established for their protection.

To-day the judicial recall advocate has to face the proposition, to which he is now forced by the increasing enlightenment of his audiences, that he must either recede from his advocacy of judicial recall or must take the position of one who is avowedly an opponent of our present form of Government. He is, therefore, relegated to the position of the socialist agitator just as long as he persists in his advocacy of the judicial recall. Placed in that dilemma, many of its

former advocates have shrunk before the alternative thus forced upon them and have given up the subversive proposition of the judicial recall and have become identified with measures less revolutionary. Some have become advocates of the "Ohio plan," requiring more than a majority decision of a court to declare a statute unconstitutional.

One of the salutary effects of this agitation has been to strengthen the cause for which the American bar has been for years working—the cause of remedial reforms in the administration of justice. That cause has advanced in the past few years with rapid strides, as shown by the adoption of various statutes and rules of procedure eliminative of former obstacles to the efficient enforcement of the law. Organized efforts for further reforms, which promise effective results, are shown by the investigations and the reports which are now in progress on the part of the National and State bar associations and on the part of associations not controlled by lawyers. The National Economic League, through its committee of 200 selected from all parts of the country and composed of the most distinguished lawyers and laymen, has, through its preliminary report just published, outlined a systematic movement for thorough reforms corrective of present evils and promotive of the best efficiency in the administration of justice.

A QUESTION OF SOCIALISM—NOT OF POLITICS.

The most healthful sign of the times is that, in view of the dilemma thus now confronting the judicial-recall advocate, the agitation of judicial recall is becoming less a matter of party politics. The two great parties of the Republicans and of the Democrats are already on record, through their platforms and the expressed views of their representative leaders, as repudiating judicial recall. The third-term party two years ago deemed it consistent with its arrogated monopoly of all progressive ideas to all y itself with the advocates of the recall of judges and of judicial decisions. The Socialist-Labor Party, which was the first party to install a judicial-recall plank in its platform, still adheres to its support of the judicial recall as an instrument of socialism. The last-named party will probably continue the only party which has, as a part of its fundamental political creed, a doctrine subversive of the judicial function and of our Government. In that position it is consistent, because the avowed object of that party is to overturn our Constitution and our form of government and to destroy rights of property and of personal liberty of which our present system of government is protective.

It is true that the third-term party candidate for governor in Pennsylvania is a noted apologist for the judicial recall. It is also true that that ex-President, who is a domineering—even if not now a dominant—factor in third-term party politics, has been a conspicuous advocate of the recall of judicial decisions. This ex-President, however, has evidently been made to feel the unwisdom of his ways in this regard, for of late he has been most eloquently silent on this subject of the judicial recall. The third-term party in New York has abandoned not only the recall of judges and of judicial decisions but also the initiative and the referendum. Their State platform carefully avoided the judicial recall planks which were a part of their

last national platform. In the present political campaign in Michigan the Republican nomination for governor has been captured by Mr. Osborn, despite the fact that he is obsessed with the judicial recall fallacies. Representative Republicans in that State, however, have called upon him openly to repudiate the judicial recall, under the penalty, if he refuses, that they will withhold their support and, independent of politics, join with the Democrats in the election of a candidate whose views on the judicial recall are not both anti-Democratic and anti-Republican. Leading papers in the State of Michigan are urging a repudiation of the judicial recall in State and county conventions. The Detroit Free Press, an influential and independent newspaper, is urging to the voters of Michigan that, regardless of partisan politics, they refuse to support any candidate or any party which, by acceptance of the judicial recall, becomes an ally of socialism. In advance of the Republican State convention in Michigan, county conventions are adopting resolutions condemning judicial recall. In Minnesota, where the people this fall vote upon a constitutional amendment authorizing judicial recall, the Republican candidate for governor has been called upon to announce himself in opposition to the proposed amendment. The rank and file, as well as most of the representative leaders of both the Republican and Democratic Parties, demand that the judicial-recall measures be repudiated. Those third-term party leaders who show signs of recovering their sanity are tending in the same direction.

THE SOCIALIST THE ONLY CONSISTENT ADVOCATE OF JUDICIAL RECALL.

The advocate of judicial recall is an ally of socialism. The fact is obvious that to-day the judicial-recall advocate is generally regarded as a vagarist. And so he is, except from the viewpoint of one who either is a Socialist or is tainted with socialism. So long as he persists in adherence to this heresy, which is repugnant to constitutional government, he is to-day forced to preach the doctrines of socialism as the only consistent basis for his fallacies. The most logical opponent of our Constitution is the Socialist. He is the foremost of its antagonists, the first in priority of time, the most active and the most persistent. The Socialist, however, frankly admits that it is a part of his social and political creed to destroy our Constitution and our Government, and to do away with rights of private property and, indeed, with all rights so far as safeguarded by constitutional provision. He frankly avows that among the barriers between socialism, on the one hand, and an orderly government with constitutional safeguards, upon the other, the first that must be broken down is the present established authority of the judiciary to render unenforceable any statute which contravenes the express protections of the Constitution. He would wipe out these barriers, if possible, by repeal of the Constitution itself; and, until such repeal shall be accomplished, he would destroy constitutional protection by eliminating all power of its enforcement.

It is a part of the Socialist creed that vested property rights in this country have, by subtle and insidious processes, been stolen or usurped from the people as a whole. It is further a part of that creed that the judicial function under our constitutional government

of adjudicating the constitutionality of a statute was also, by devious methods, stolen or usurped by the courts themselves, and that this was done for the benefit of, and through the procurement of, conspirators representing the interests of property holders and in violence of the social and political dogmas of socialism which defy all restraint, and which, therefore, defy all protection by the Government of property and personal rights. This right of private property and this power of its safeguarding through the exercise of the judicial function are therefore to the Socialists both a right and a power which neither any citizen nor the citizenship of the Nation or of any State is under any obligation to respect. They would eliminate both by indirect methods if possible, but if necessary they would destroy both by any direct methods efficient for that purpose.

It is significant that the instrument which the Socialists would use for this revolutionary change is the judicial recall. The modern advocacy of the judicial-recall measures sprang from socialism. The present Socialist-Labor Party was the first political party in America to demand the recall. The judicial-recall measures are essentially mere instruments of socialism. As stated by the leading organ of the Socialists, the Appeal to [T]Reason, speaking of the judicial recall:

> It is the means whereby the people will be enabled to inaugurate socialism, and after that is done they may secure democracy in industry.

So the Socialists inveigh against the Constitution and against the judiciary. It is the platform of the national Socialist Party which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been usurped by the courts. The same platform further declares that these measures—that is, the recall measures and the abolition of the functions of the courts—

> are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance.

Keep these facts in mind when you are told by others, who know or ought to know better, that the powers exercised by our courts have been "arrogated" to or "usurped" by the courts themselves; and when you are urged to wrest from the courts their chief functions and to turn over to the people the direct control of judges or the direct adjudication of constitutional questions.

THE SOCIALIST VIEW OF THE FEDERAL CONSTITUTION.

The Socialist view of our Federal Constitution may be assumed to be authentically presented by a recognized Socialist who contributes to a certain American monthly magazine, which, before its period of decadence, had some elements of respectability. Some of you may remember, even in these days of its obscurity, a monthly periodical known as Pearson's Magazine. Within the past three years this magazine has been exploiting in its columns such unwarranted and dastardly attacks upon our Federal Constitution that it has thereby sufficiently demonstrated its right to the boast flaunted upon its cover page that it prints stuff "that others dare not print." Even in this day of sensation mongers it is probably true that no

other publication would have had the effrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term "patriot fathers" as applied to the framers of our Constitution. It brands them as "grafters" who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which "was never meant to bring about rule by the people," but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured all for the sole purpose "to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common people." The Constitution of the United States, it says, was made for the people "in the same sense that sheep shears are made for sheep. The gentlemen who made the Constitution had sheep to shear." This is the view presented by a 1913 American journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.

To such an extent has this periodical joined the forces of the Socialist propaganda that the reprints of its articles, reviling the Federal Constitution and its makers and expounders, have become religious tracts and textbooks of enormous circulation in Socialist circles. The unfortunate feature of this Socialist propaganda is, that these vitriolic pamphlets, copyrighted, sold, and distributed by the publishers of Pearson's Magazine, have had, and are still having, a poisonous effect upon the minds of many editors, magazine writers, newspaper men, and citizens generally, who are misled by these instruments of error.

THE CLIMAX OF SOCIALIST DEFAMATION.

Not content with reviling the Constitution and its makers, the Socialist goes to the extreme of defaming the signers of the Declaration of Independence and the instrument itself which declared the separation of this Nation from the tyranny of monarchy. In a "patriotic edition" of the Socialist organ, Age of Reason, published at Dallas Tex.—its last July number—it is declared that the patriots of the Revolution, when they returned home from their battles—

> found that the thieves of America had written this document to fool the workers with. * * * They were then compelled to go to this robber-creditor class (who had written the beautiful document above referred to) for supplies to make a crop. These liberty-loving thieves were also the lawmakers—the makers of the laws they had passed to imprison men for debt. * * * Could the demons of hell hatch a more damnable plot againt the working class? * * * Just a few men have the right to make the laws, hence they make the laws so that just a few men can own the property. * * * They framed this document so that it would arouse the ire of the working class and cause them to rise up and drive the British out of this country, and give to this bunch of American capitalists the right to make the laws so that they could take the place of the English capitalists and rob the working class.

And more of the same twaddle, ad nauseam.

ALLIES OF SOCIALISM.

It would be useless to detail these shocking affronts to the sense of decency of enlightened citizens, except to bring home to our minds the malignant forces of disruption with which many persons, who

would repudiate socialism as such, have, in fact, become allies. For the Socialist is to be commended in his attacks upon the Constitution as compared with the less frank, the subtle and insidious attacks indulged in by those who either know, or ought to know, better.

Aristotle defined a demagague as one who catered to the prejudices of the people by attacking existing institutions, and particularly the judges and other magistrates, and urging more power for the people, to be expressed by popular majorities, although leading to a nonconstitutional democracy of a sort which is analogous to a tyranny.

Aristotle's definition applies to-day to many conspicuous advocates of the judicial recall, some of whom I shall mention.

Ex-President Roosevelt has demonstrated that he is afflicted with what physicians or alienists would term an incurable idiosyncrasy for all legal and constitutional questions. He has just been telling the citizens of the South American Republics, whose Governments are modeled upon our own, that our constitutional system of government is wrong and that the prime function of our courts is performed only through usurpation of judicial power. In his speech the other day at Buenos Aires he aligned himself with the Socialists who advocate the destroying of constitutional safeguards and then the wresting from owners of holdings of private property.

Roosevelt allied himself with the Socialists, advancing the doctrine which is a creed of socialism, when he said, at Buenos Aires, that the power at present exercised by our courts to preserve and enforce constitutional safeguards is a power "arrogated" to and "usurped" by the courts themselves. He further allied himself with the socialist method of muckraking our Constitution and our judicial system when he stated, at the same time, that for more than 30 years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege," and against the interests of the people. This statement is no mere lapse from overenthusiasm, for he assures us that he makes it "gravely and deliberately." We have in him, then, an ex-President preaching socialism. For this attack upon our judiciary is precisely the same as that which has been continuously for years (and also, in the words of Roosevelt, "gravely and deliberately") made by the Socialists as the basis for their doctrine that the Constitution with all its safeguards should be wiped out. Moreover, the instruments of destruction which they advocate as the most efficient to accomplish this end are precisely the same judicial-recall measures that are urged by Roosevelt.

Roosevelt refers to the decision recall as a newly discovered remedy—as "My remedy"—although it was thoroughly discussed and unanimously repudiated in the Australian constitutional convention 10 years before, evidently, he ever heard of it. It was rejected as manifestly inconsistent with and repugnant to a constitutional form of government; and this, too, at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.

"EVERYBODY'S" SHOULD BE NOBODY'S.

Another unscrupulous and despicable contributor presented some time ago in another magazine (Everybody's—it should be nobody's)

a venomous attack upon the judiciary, in which he traduced individual judges, maligned the courts, and calumniated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to discriminating persons brought only the reaction of an intense shock to their sense of decency. The Tennessee bar may be proud of the manner in which one of its members paid his respects to this "Connolly person" journalist; and if any of you should wish to read in print the sentiments of protest which you felt at the time, I would refer you to Mr. Caruthers Ewing's speech two years ago before the Georgia State Bar Association.

THE JUDICIAL PERVERT.

Such are the various and eccentric moods of the human mind that it is not astonishing that, now and then, even a member of the American bench should be found so to partake of the characteristics of the pervert as to allow himself to become allied with those whose creed is based upon a derision and revilement of our Constitution, of our constitutional democracy and of the administration of our Government. No Socialist has gone to a further extreme of malignant vituperation in discussing our Federal Constitution and its makers and expounders than has a certain chief justice of the supreme court of one of the oldest States of the Union. Let me say here, for the North Carolina bar and for the citizens of that State, that when recently I denounced the views of this judge and their utterance from such a source (which it was my pleasure and privilege to do in the presence of this chief justice and before the bar of his State) the fact was demonstrated to me that his assaults upon our Constitution and upon the judiciary of the Nation and his advocacy of judicial recall, have been and are offensive to the press, to the bench, to the bar, and to citizens of that great State. I doubt that 1 per cent of the bench and bar or of the citizens of North Carolina have any sympathy with the apostate attitude assumed by this chief justice upon these questions.

Chief Justice Walter Clark of the Supreme Court of North Carolina, in his address at Cooper Union, New York, last January, chooses to view the issues of reform, social, economic, and constitutional, which have been and still are pressing, as merely issues between an unrighteous controlling class, upon the one side, and an oppressed class upon the other. The past and present issues of judicial reform, of the framing, construction, and enforcement of our Constitution itself, all these issues have been and still are simply the struggle between the "exploiters," upon the one hand, and of the "exploited," upon the other hand.

The Constitutional Convention at Philadelphia in 1787 assembled, he says, only "for the nominal purpose" of creating better business and commercial relations between the States and to supply the need of a stronger Union. In default of the trust imposed upon them, and using the pressing necessities only as a pretext for their selfish ends, the framers of our Constitution shaped that instrument "with sublime audacity," as he says, with the very intention and with the very result that the "reactionary" "exploiters" of an oppressed

people then took and have since maintained control of our Government. As "the allied vested interests" then intentionally made the Federal Constitution an instrument of oppression and injustice, so they next, by various means, persuaded the different States to its adoption. The same "vested interests" afterwards procured, to be stolen or "usurped" from the people, the power, never intended for the courts, of the judiciary to declare invalid and unenforceable statutes repugnant to the express prohibitions of the Constitution. This was a further grasp of power by the designing "exploiters" in control. More than that, the courts of the land, he asserts, have become, by usurpation, the arbitrary, capricious, and oppressive rulers of the people. The fourteenth amendment "means anything and everything that the judges see fit." The decisions of the Federal Supreme Court have been subtle perversions of the law and the reasonings of those decisions are mere instances of "sardonic irony" and of "adding insult to injury."

This chief justice reechoes the Socialist cry when he says, referring to the discontent prevailing among certain classes of citizens:

> The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negatived by the courts, whose sympathies are with the propertied class and vested rights.

To overturn this "government by judges"—a government which is "very largely a plutocracy"—he would deprive the judiciary of its power of final determination of constitutional questions and would leave the adjudication of such questions to a referendum ballot through the recall of judicial decisions or would deprive the courts entirely of their power of declaring any statute unconstitutional. He would, therefore, replace our system of judicial functions with that which is in vogue in England; although, as is well known, English statesmen have deplored the deficiencies of their system and praised the American judicial function as a scientific model for all the world.

Our confidence in the correctness of the observations of this jurist is not increased by the fact that he tells the people of New York that it was judicial usurpation when the United States Supreme Court overruled "your State statute" in the Lochner case, and that in the same decision Justice Holmes makes a certain statement in regard to the police power, for the statement quoted from Justice Holmes was not made in the Lochner case, but appears, in connection with an entirely different state of facts, in the later case of the Noble State Bank *v.* Haskell.

Before you, before any citizen of well-balanced intellect, not tainted with the enticing but fallacious dogmas of socialism, who has studied the subject impartially, it is unnecessary to offer an answer to the jibes and epithets with which Chief Justice Clark characterizes our Constitution, its makers, and its expounders. A lawyer of the American bar naturally resents such derision of our institutions, especially when uttered in such a spirit from such a source.

But consider the effect of such utterances, especially from such origin, upon masses of the people, untaught in the science of Government, many of whom are already incited to restlessness and even to open defiance of authority. Why thus wantonly and recklessly furnish encouragement, aid, and ammunition to the forces of disruption?

Why thus excite further the already too prevalent spirit of antagonism to our free institutions? Why thus feed the fires of unrest, of discontent, and even of rebellion, which are even now threatening devastation?

The primary purpose of public discourse touching the relations between the Government and the individual should be to inculcate methods of calm, deliberate, impartial study and consideration on the part of the citizen, and to help to bring to him an enlightened appreciation of the necessity and wisdom of established rules of conduct in governmental law, as well as in respect of social relations; to teach the citizen that his selfish whim, caprice, prejudice, or interest must yield, to some extent at least, to the general interests of the community; that the general public interests can not be safeguarded without lawful submission to the authoritative enforcement of the protective provisions of the fundamental law, which are such rules of conduct established for the good of the Nation; and that that Government is ultimately the most wise and beneficent, as well as the most stable, which is founded upon enforceable rules of conduct protective of the individual and of the minority, as well as of the majority. The object should be to promote better citizenship.

If the holding up, before the people of our Nation, of our Constitution and our American form of government to the derision and contempt of its citizens is promotive of better citizenship, then "better citizenship" means the citizenship of socialism: it means the rule of the dynamiter. Justice Clark's address would make an orthodox chapter in the creed of the socialists, or a consistent editorial in their organ, The Appeal to Reason, or in the anarchist organ, Mother Earth. You will note that Chief Justice Clark shows more familiarity and more sympathy with the propaganda of socialism than he does with the Federal Constitution or with the decisions of the Federal Supreme Court.

And yet this muckraker of our Constitution and courts has had the audacity recently to aspire to appointment as Justice of the United States Supreme Court! If thus holding in contempt the institutions of this country, he were a foreigner and as such should come before one of you, sitting as a judge to pass upon his application for naturalization, what, do you think, knowing his views, would be your judgment as to his qualifications to take the oath of allegiance and citizenship?

THE JUDICIAL RECALL NOT REMEDIAL, BUT SUBVERSIVE.

The recall of judges has the effect to subject judges to the constant menace of the arbitrary will of the voters of the judicial district in which they preside. It leaves to a mass meeting of voters, controlled by a majority of those who happen to be present, the arbitrary power to unseat a judge. The exercise of the recall in Oregon has shown that, despite the pretention to the allowance of a defense and hearing, the decision of the voters is controlled by hue and cry and that the system is merely a return to the ostracism of ancient democratic tyrannies. Its effect is only to lessen, to the point of destruction, whatever of independence is left to the judge by the judicial elective system. It invites, even compels, a judge to keep his ear to the ground

and to anticipate the changing whims of popular passion. He is made a servant, not of the law, but a mere spokesman of the caprice of majorities. The system, therefore, is one which tends to eliminate the protective force of constitutional safeguards.

The judicial decision recall is more directly subversive of our system of government. Its effect is to vest in the makers of a statute the power to dictate as to its enforcement, irrespective of the question whether or not it deprives any citizen or any set of citizens of their liberty or property without due process of law. Indeed, the enforcement of such a statute, under the decision recall, is not left to its legislative authors, who may be supposed to have given to it some method of deliberation; its enforcement is left to a mass meeting of the electors of such legislature.

THE COLORADO EXAMPLE.

The best illustration of the real significance of the decision recall is the Colorado example.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any State statute may be made ineffective by a majority of the votes cast by State electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the judicial decision recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day and another way another day with reference to the same provision. One city might decide one way and at the same time another city another way with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a reductio ad absurdum of the decision recall argument.

THE FALLACY OF JUDICIAL USURPATION.

The most common fallacy leading to the greater fallacy of the judicial recall is that arising from the too prevalent misrepresenta-

tion and the resulting misunderstanding with reference to the nature of the judicial function under our system of government. This fallacy is embodied in the socialist doctrine that the judiciary has "usurped" the function to pass final judgment upon the question as to whether a statute is repugnant to the Federal Constitution. This fallacy is the product of socialism, with which certain present-day agitators have become infected to the extent that they, too, proclaim that this function of the courts has been "grasped" by the courts themselves. Some refer to it as a "veto" by the judicial department upon the acts of the legislature. Others refer to it as an arrogated power of "judicial nullification," unwarranted under a proper view of judicial functions. They would deprive the courts of that function which is essentially the function of the courts—the function of weighing the facts and the law as applied in a particular case to a particular statute and afterwards of expressing in a final decree their deliberate and well-considered judgment upon the question of constitutionality. They would substitute, in the place of the careful judgment of a tribunal of triers experienced in the trial of facts and learned in the law, the arbitrary and capricious prejudgment of comparatively incapable arbiters declared at a mass meeting or at a referendum election.

As this claim of usurpation is the foundation of the hue and cry made by the socialists and their allies, and is such a common basis for the judicial recall arguments, let us here note briefly some reasons why it is unfounded. The same chief justice, heretofore referred to, has publicly stated with reference to this judicial function:

> The possibilities of the court were not understood, and indeed were unknown until the vast extension of power was grasped, without any grant in the Constitution itself, by an obiter dictum opinion in Marbury *v.* Madison, * * *. The importance, indeed the overwhelming preponderance, of the judiciary in the Government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States, without a line in the Constitution to authorize it, when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case known as Marbury *v.* Madison by Chief Justice Marshall. The doctrine was shrewdly set forth in an obiter dictum, * * * promptly seized upon as a boon by the special interests and by all who at heart believed in the government of the many for the benefit of the few.

Let us pass the imputations as to the motives of Chief Justice Marshall and review a few facts, the accuracy of which is demonstrated by printed records and statutes. We may draw for our matter upon authentic records of events and upon Federal statutes antedating the "surprise" of 1803; instead of misquoting the decisions of the Federal Supreme Court or branding them as "shrewdly" perversive to the law, and also instead of adopting obiter dicta from socialist textbooks.

That our fundamental law makes the enforcement of constitutional safeguards the primary function of the judiciary, Federal and State, was demonstrated by Chief Justice Marshall in the famous case of Marbury *v.* Madison (1 Cranch, 137), in which Chancellor Kent declares—

> the power and duty of the judiciary to disregard an unconstitutional act of Congress or of any State legislature were declared in an argument approaching to the precision and certainty of a mathematical demonstration.

The limitations of the Constitution were expressly made the supreme law of the land, binding upon all courts, Federal and State, and with the duty, under oath, of every judge of every court to observe them as the paramount law of the land, Chief Justice Marshall demonstrated that, not only by express provision but also by necessity, it was the duty of the courts to declare unenforceable a statute which contravened the Constitution. He said:

> The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? * * * A legislative act contrary to the Constitution is not law.

It is urged by the Socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Justice Marshall was a usurpation by or arrogation to the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of Marbury *v.* Madison. But that this was the interpretation of the Constitution upon the faith of which, more than any other single feature, the original States were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton, and others prior to its adoption. Hamilton urged in the Federalist:

> There is no liberty where the power of judging be not separate from the legislative and executive power. * * * The complete independence of the courts of justice is peculiarly essential in a limited constitution, * * *. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void.

Upon the same ground Ellsworth, on January 7, 1788, urged the ratification of the Constitution upon the Connecticut convention, when he said:

> If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, or if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so.

This doctrine of the judicial function had been prevalent in the States of the Federation prior to the adoption of the Federal Constitution, and had been recognized in the State of North Carolina, where, in the case of Bayard *v.* Singleton (Martin's Repts., p. 42), it was advanced by Mr. Iredell, who was subsequently an Associate Justice of the Federal Supreme Court. Indeed, 14 years before the decision of Chief Justice Marshall in the case of Marbury *v.* Madison, and immediately upon the adoption of the Federal Constitution, the Federal judiciary act was passed by the First Congress under the Constitution, expressly providing, as it has ever since provided, for the review in the Supreme Court of the United States of the judgments of inferior Federal courts, as well as for the review of cases where the validity of State statutes or any exercise of State authority should be drawn in question, on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision should be in favor of their validity.

Now, how can any man, who is informed of the facts and who at the same time is sane and conscientious, for a moment say that the judicial function of declaring statutes unenforceable which are repugnant to constitutional prohibitions was usurped or "created" through the decision of Chief Justice Marshall in 1803, and that theretofore it never existed in fact and was never before recognized and was never before intended to be recognized in our American jurisprudence? Why, not only had it been so understood by the States in their adoption of the Constitution, but almost the first act of the American Congress under that Constitution, and 14 years before Chief Justice Marshall's decision, was to write that particular judicial function into the statutes of the United States, and in the very form and wording in which it has ever since been expressed.

This act was drawn by Oliver Ellsworth, the third Chief Justice of the United States, and himself a member of the Federal Convention. Thus the First Congress confirmed that theory of the Constitution, on the faith of which its adoption by the States was procured, and which was further confirmed and demonstrated by Chief Justice Marshall, in the first case in which it was passed upon by the Federal Supreme Court—that the question of the repugnance of a statute to constitutional prohibition is a judicial question, the determination of which belongs, under the Constitution, to the courts; and that the final determination of the repugnance of a statute, Federal or State, to the Federal Constitution belongs to the United States Supreme Court.

This charge of "usurpation" is a mere pretext for striking at the very keystone of our system of government.

OUR CONSTITUTION A SCIENTIFIC MODEL.

It is not my purpose here to attempt a defense of our constitutional system of government. In contrast, however, with the methods of attack which I have outlined, let me here briefly note that the American Constitution, with its established functions of the judicial department, is in fact, and has become recognized as such throughout the world, the foremost scientific model of fundamental law.

The history of the advance of civilization has been the history of the emergence of the judicial conscience from the malignant influence of oppressive interference. As shown by Mr. Edward J. White, in his book to which I have referred, the Babylonians, more than 2,000 years before the Christian era, had the recall of judges and the recall of decisions by the exercise of the tyranny of monarchy. Under the pure democracy of ancient Greece, through the system of ostracism, was exercised the judicial recall in both its forms. So, under the unlimited democracy of the Roman Republic, the referendum ballot was used to inflict banishment or death upon the judges or to overrule their decisions.

The transition from comparative barbarism in governmental affairs, from the tyrannies of monarchy and of democracy which brought disgrace and disaster to the Governments of old, to an enlightened recognition by all classes of the necessity of a reestablishment of the judicial function, began when the English people wrested our Bill of Rights from King John at Runnymede. But that was only the first step; for it took centuries to bring home to the advancing Eng-

lish civilization the fact that bills of rights, no matter how assertive of the inalienable rights of the individual against the injustice and oppressions of the tyranny of arbitrary control, were futile to effect protection without the independence of that department by the proper exercise of whose functions they might be enforced. Such power of enforcement was lacking until the beginning of the eighteenth century; because, prior to that time, the English sovereign reserved and exercised the power of arbitrary recall of any judge, and judicial judgments were subject to the election of the sovereign. The statute of William III, however, enacted nearly a century before the adoption of our Federal Constitution, established in English jurisprudence the principle that the members of the judiciary, during the term of office for which they were selected, should be independent judges of the law and not the servile tools of either a monarchial or popular sovereignty; that their judgments when rendered should be enforced as the law, at least as the law of the case; and that their recall or that of their judgments should not be accomplished by hue and cry spread among the people to influence the results of a referendum election, the possibility of which, if recognized by law, always stands as a menace to the justness and independence of the judge and of his judgments.

It took centuries even to begin this revolt from barbarism. It took still further centuries to establish the principle of an independent judiciary as a requisite to the most enlightened system of jurisprudence ever known in the history and science of government. In the two centuries following, it was by the enforcement of this principle that meaning and efficiency were given to the fundamental doctrine of individual liberty embodied in the same Bill of Rights which is written into our own Federal Constitution, and made, by the same instrument, the supreme law of the land controlling upon all judges, State and Federal; and which has become also a part of every State constitution since formulated.

It was under this establishment of effective protection, not merely theoretical protection, of the individual and of the minority against the arbitrary caprice and oppression of local or temporary majorities, that has made stability, efficiency, security of life, liberty, and property of persons and of minorities, prosperity and enlightenment of its citizens, the characteristic features of the Government of this, the greatest Republic in the world's history. It is these scientific, practical, and effective features of our system of government which have made it the model for all modern governmental reorganizations and have made our Constitution and the government administered under it the objects of admiration and even marvel of the masters of the science of government. Gladstone characterized our Constitution as expounded by Marshall, "the most wonderful work ever struck off at a given time by the brain and purpose of man." Bryce, the greatest modern student and authority upon constitutional government, terms ours, as "the first true Federal State founded on a complete and scientific basis."

Lord Brougham, referring to our Constitution, said:

> The power of the judiciary to prevent either the State legislature or Congress from overstepping the limits of the Constitution is the very greatest refinement in social quality to which any set of circumstances has ever given rise, or to which any age has ever given birth.

The English historian, John Morley, referring to the opinion of the world's students of government and their attitude toward our Constitution, said:

> Everybody praises the American Constitution these days.

Lord Salisbury said, in 1882:

> I confess I do not often envy the United States, but there is one feature in their institutions which appears to me the subject of the greatest envy—their magnificent institution of a Supreme Court. In the United States, if Parliament passes any measure inconsistent with the Constitution of the country, there exists a court which will negative it at once, and that gives a stability to the institutions of the country which, under the system of vague and mysterious promises here, we look for in vain.

If Lord Salisbury says this of the English system, what reply would he make to one who holds up to you as models above our own the judicial systems not only of England but of France and Germany? The French and German are systems still more "of vague and mysterious promises," for the very reason that they are based to a still greater extent upon a disregard for precedents. A government of law can not exist where the only basis for arriving at the conclusions of fact and of law in a litigated case or in a criminal prosecution is the mere passing impulse of the triers with reference to what they may deem to be the merits. One might as well commend to us the system of Mexico. There is a Government, the administration of which is not hampered by any regard for precedents, nor by any regard for a constitution, much less by any regard for constitutional limitations. There is a Government administered without the intervention of any judicial functions, usurped or otherwise. In Mexico they are not bothered with precedents, nor even with any system of promises of protection to life, liberty, and property, either expressly written or vague and mysterious. The condition of Mexico is the logical result of the elimination of constitutional protection and of the debasement of the judicial function. To such a goal would the revilers of our American Constitution and judiciary turn the people of this Nation. Justice, equality, and consistency in the administration of law, protection for the established rights of life, liberty, and property require that all magistrates should act with a proper regard for precedents.

Shall we replace our present constitutional democracy with a democracy which has no enforceable bill of rights; which has no stable, sure, consistent, or equally administered constitutional protection for the individual as to his life, liberty, or property? Shall we destroy that stability of our institutions which, as Lord Salisbury said, is protected by the exercise of judicial functions as they are established under our Constitution? Shall we, by making the will of the legislature enforceable upon the demand of a popular majority, destroy constitutional protection, and make our system of Government also a mere "system of vague and mysterious promises"?

All this we do as soon as we consent to subject judges or judicial judgments to a referendum election.

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